juries and the courts that have jurisdiction of those claims.

If you take what Grace is doing here at face value, it never intended from the day it filed this case to use this Chapter 11 proceeding for the normal purpose of restructuring its business through arrangements with its creditors that the Bankruptcy Code contemplates. In violation instead of the spirit if not the letter of the Third Circuit's decision in the SGL Carbon case, Grace is simply attempting to convert the bankruptcy -- its bankruptcy case into a form of aggregate mass tort litigation that it couldn't accomplish outside of bankruptcy, and in the process it's basically trying to convince this Court that the normal rules in claims allowance that allow the claimant to -- you know, you've got to have an objection to the claim.

I mean here under the bar date, Your Honor, Grace has never objected to these claims. They're all deemed allowed right now, because there's never been an objection filed. All the claims were filed under POCs and the bar date. I mean, obviously, they're not allowed, but I mean the whole notion of a claim, an objection, a hearing, a right to defend yourself, put your claim forward, a right to elect who your trial expert is going to be as opposed to some guy who you might have gotten some x-ray from while you were considering filing a lawsuit against somebody, everything of that is just tossed out the window, and it is simply not possible under the Bankruptcy

Code. It's not a legitimate use of the Bankruptcy Code, and I'm sure at the end of the day this Court will not countenance it.

That said, I rather suspect that the Court is not going to Daubertize any of the witnesses. We've been through a process in some other cases before Your Honor, and so while I'm going to turn the podium over now to others to address some of that, particularly given the fact that Mr. Bernick didn't spend a lot of time on most of the witnesses, hopefully, we will be able to avoid having too much further discussion on that subject. Thank you.

THE COURT: Mr. Finch.

MR. FINCH: Nathan Finch for the Asbestos Claimants Committee. Don't show any graphics unless I tell you to.

The -- let's talk about what's not disputed here. There is well-established epidemiology for the projected future course of mesothelioma. Dr. Nicholson's projections, you heard Mr. Bernick say that they were sound science.

Second, we know that 27 million Americans have been occupationally expoed to asbestos.

Third, we know that Grace made asbestos-containing products that were broadly used in a wide variety of places. Their Monokote III, which is the asbestos spray on insulation product, has been called one of the -- it become the dominant fireproofing product in the country and was the focus of most

of the litigation. They also made insulating cement and made acoustical plaster, all of which had chrysotile asbestos that was infected with Trimolite from the Canadian mines. They have --

UNIDENTIFIED SPEAKER: Excuse me. If you could just lean a -- I can hardly hear.

MR. FINCH: Sure. Excuse me, Your Honor. They have admitted that -- testified -- their witnesses have testified that Grace products have been identified by plaintiffs as being on any kind of construction or industrial site. It runs the whole gamut except for possibly shipyards. And, in fact, they have actually lost some cases arising out of shipyards.

So you've got this huge toll of disease nationwide. The United States government statistics show that the mesothelioma incidence rate, what they actually count, is still going up. I mean it's basically been flat for a long time, but it's still going up. We've got, you know, 26/27 hundred mesothelioma deaths in the United States now. The death rate from asbestosis is going up, and the number of people who die from asbestosis is only a very small fraction of the people actually ultimately who have the disease.

And so the question is how do you estimate that liability on Grace's part. And I'm going to first talk a little bit about their methodology and explain why -- in addition to the reasons Mr. Lockwood articulated, why it's just

not reliable and doesn't fit the law. What Grace is ultimately trying to do is take Daubert and turn it into a substantive rule of decision under state law. Forty-six states have Daubert or a version of Daubert. They call it Havner in Texas. They call it High in Maryland. But the point is the scientific basis for getting an expert's report or expert's opinion in front of a jury, there's a mechanism to challenge that or has been for many, many years after 1993 and in some states before that.

So what they're trying to do is they're trying to say only if you believe our experts, are -- would any case conceivably get to a jury, and that's making a factual determination that -- it's going to depend on the facts and circumstances of each of the 100,000 individual cases. You can't do it globally, and they're inconsistent with the law. And a couple of the cases that we cited in our reply papers, I'll just read you the quotes.

The first is the Rutherford case from California, which the substantive rule in California says, "If plaintiff's prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to the defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested and, hence, to the risk of developing asbestos-related cancer."

There's no requirement that there's a doubling of the risk for each exposure or each particular product.

The Berger vs. Amkin (phonetic) case, which is a case in New York by the judge who has all of the asbestos cases in New York, who listened to the testimony of Dr. Mogavkar, one of Grace's experts here, and a lot of other experts trying to Daubertize the -- or New York state law equivalent -- the expert testimony from plaintiff experts in braverker cases, which is a lower exposure and a different type of exposure than the types of exposure we're talking about here. What the Court wrote in that opinion, and this is at 818 New York South 2d 762, "Scientists and physicians use various means to establish causation in particular situations, not the least of which are toxicological and pathological studies and documented case studies. While epidemiology may be the gold standard, it can't be the only standard in an area where caustion is both particularistic and well established. Federal courts have also held that epidemiological evidence is not necessary to establish causation. It is not really important to have an epidemiology study to determine whether the risk of cancer is increased by asbestos exposure in every occupation."

That's what Grace is trying to do here. The ACC and the FCR are going to call on medical experts, Dr. Laura Welch, who is an industrial medicine doctor and an epidemiologist who's run the largest screening epidemiological study of sheet

metal workers, 17,000 workers over the past 20 years, Samuel Hammar, a pathologist, a Dr. Rodwi (phonetic), another pathologist, Arnold Brirody (phonetic), a cell biologist. All of them basically take issue with Grace's threshold idea that you need to have -- that only people who have personally mixed or personally installed asbestos could be possibly be exposed to enough Grace asbestos to cause their disease.

The fact is each case turns on its own individual facts. The plaintiff in each of those cases would be able to hire his or her own expert for the purposes of proving up a case against Grace, and the medical literature -- there is medical literature. Grace discounts the studies relied upon by the doctors that the ACC and the FCR will put on, but the fact is they do show an excess risk or a doubling or quadrupling of the risk with fiber exposures down to well below one fiber a year of exposure. And, you know, Grace can take issue with the peer review medical literature, but that's a function of cross examination that would come up in each individual case, and Your Honor is not going to sit here and try 100,000 cases.

How much exposure and whether someone has an asbestos-related disease turns on the facts and circumstances of the case. And in a mesothelioma case -- and most of what I'm talking about here is mesothelioma, and it's real -- there's not a dispute about the disease. It's just did the defendant's asbestos contribute to the causation of the

disease? And there's not -- it doesn't have to be that the defendant's asbestos was the sole cause of the disease, or that the defendant's asbestos doubled the risk, because it's cumulative asbestos exposure which ultimately causes disease. So that's their mix and install criteria for mesothelioma.

Another criteria they have is you have to have radiologically diagnosable asbestosis in order to attribute lung cancer to asbestos exposure. And the consensus medical view by the Helsinki criteria, which is a group of experts with over 1,000 years studying asbestos-related disease, have said that you can have asbestos-related lung cancer if you have sufficient exposure, but you don't need to have radiologically diagnosable asbestosis. And, in fact, Grace's criteria don't even permit someone to prove pathologically that they have asbestosis, and I think Grace's experts would admit that if you have asbestosis pathologically, it may not show up on an x-ray, but you definitely have asbestosis.

And so even if you were to say that you need underlying asbestos to attribute lung cancer to asbestos exposure, which the medical literature says you don't need -- there's a lot of medical literature that says you don't need -- Grace's criteria rule out even the people who can prove it pathologically.

The -- Mr. Bernick, quote, testified or talked about various aspects of the tort system, and in the tort system --

what people did and didn't do in the tort system. Whatever Mr. Bernick says, whatever I say, whatever any of the lawyers say up here is not evidence. We're going to -- you're going to hear evidence from Steve Snyder, who's -- who has represented companies in the tort system for over 20 years, from Dan Meyer, who's a claims adjuster who's settled over -- he or his group have settled over 200,000 asbestos claims, from Peter Krause and John Cooney, who represent primarily mesothelioma victims, about what the standards are in the tort system, what Grace required in order to settle cases.

Mr. Bernick would have you believe that Grace settled any case that came in the door without regard to whether it posed a risk to it. In fact, for every case that Grace paid money to -- and here I'd like to -- well, I'll pass on the graphic. Grace required proof of exposure to a Grace product sufficient to satisfy it and proof of disease to satisfy it, and it paid the plaintiff the amount of money that was something less than what he would recover at trial. Something far less than what he would recover at trial, but both sides are basically hedging their bets as to what might happen if discover played out.

And the defense lawyers from Grace testified at deposition, which is going to be their trial testimony -- since they haven't been listed by witnesses, and we can't compel them here by subpoena -- that the reason they chose to settle these

cases and the standards they used to settle these cases was the best way to minimize the liability.

MR. BERNICK: Yes, I'm remimded that the testimony that Mr. Finch is reciting --

THE CLERK: I'm not picking you up, sir.

MR. BERNICK: I'm reminded that the testimony that Mr. Finch is citing is testmiony that was taken I believe subject to a confidentiality order, because it relates to settlement materials, and I believe that that was one of the conditions pursuant to which we agreed to allow that discovery to take place. So to the extent that Mr. Finch wants to get into that, and I would I guess suggest that I believe that some of this -- I'm not sure this is covered in the briefs, but to the extent that Mr. Finch would want to get into it, I think that we have an open court here, and I'm not sure that that would be appropriate. I really don't want to spend a huge amount of time on this, but I am compelled to point out that I believe those are the terms of the order.

THE COURT: All right.

MR. FINCH: I'll pass that. That's the only reference I'm going to have to this, Your Honor. I'm not going to show any of the documents. Suffice it to say there's a lot of them, and we'll put them into evidence at the appropriate time.

We do have -- Grace did try some asbestos cases. It

tried about 80 cases to judgment. It won about two thirds of them, but the ones that lost, the judgments were catastrophic compared to settlement averages.

Let's talk about the Peterson and Biggs estimation methodology. The fact is that it is generally accepted in non -- both in litigation and non-litigation settings. One of the things we attached to our brief was an expert report from Tom Florence in the Vellumoid case where he testified in the Federal-Mogul cases this summer about Vellumoid's asbestos liabilities, about the asbestos liabilities of Pneumo Abex, about other asbestos liabilities, and in each and every one of those reports he said, and I quote, that, "His estimates were based on generally accepted forecasting methods and pre-petition filing trends." And he goes on to describe, "The forecasting processes incorporated the methods illustrated in Nicholson and Perkel --" John, can we show this?

"The forecasting process incorporated the methods illustrated in Nicholson, Perkel, and Selikoff, the courts have accepted this or similar -- the same or similar methodologies for forecasting future asbestos claims in numerous proceedings."

And Dr. Peterson has studied asbestos litigation and mast tort litigation for over 25 years. He's a Trustee of the Manville Trust. He is a Trustee of the Fuller-Austin Trust. He was a founding member of the Rand Institute for Civil

Justice. He has been an expert for the courts in valuing asbestos claims on four occasions. He has about as much experience in studying the tort system as anyone out there.

Ms. Biggs has worked for insurance companies and estimated liabilities using methodologies somewhat different, but the basic -- fundamentally it's the same as Dr. Peterson.

Dr. Florence has that expertise, has the ability to estimate liability of asbestos companies. In their briefs Grace called Dr. Florence a statistician. I think he might be somewhat offended by that. His -- he holds himself out and is an expert in what's the liability of a company facing asbestos claims.

And what Grace ignores in its Daubert challenges on Dr. Peterson and Ms. Biggs is there are many types of science and there are many types of specialized language, and the Rule 702 doesn't mean you have to be able to run a laboratory experiment. You can have scientific, technical, or other specialized knowledge to assist the trier of fact.

And, ultimately, the -- Daubert boils down to does the expert employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in a relevant field? And the answer to you, Your Honor, is that is exactly what Dr. Peterson has does here, and that is what Ms. Biggs has done here. They use the same methodologies here they do in non-litigation settings outside of court.

And why does the Nicholson methodology produce the most reliable and the best estimates of a future liability of an asbestos company? Three things that haven't changed for 25 years -- although Mr. Bernick talks about changes in the legal system, what he's -- what Dr. Peterson's testimony was is you can't predict today what the law is going to be in a particular jurisdiction tomorrow, whether the federal government is going to pass the fair act tomorrow. What we do know that over the past -- ever since Borrell (phonetic) in 1973 that the law has compensated mesothelioma claims and asbestos claims. We do know the asbestos-related epidemiology. We know the future time course of the asbestos-related cancers. And, finally, we know that the best evidence of what a company's likely to pay to reduce the judgment and settle cases tomorrow is what it's paying today, taking into account the most recent trends. So we have the disease curve. Now --

THE COURT: Would you say that last sentence for me again? I'm sorry.

MR. FINCH: The best evidence of what a company is going to pay to deal with asbestos liabilities tomorrow just is what it is paying today taking into account the trends that line up to where it is. Just like the best estimate of what you're going to have to spend on gasoline next week is what you're paying this week not what you're paying ten years ago. The best evidence going forward is you take the most recent

time and you project it forward based on what you know today about the trends and what has happened since.

So what do we know about Dr. Peterson's methodology and those trends? Could I have Dr. Peterson's report, the page showing the claiming history?

THE COURT: Just a second, Mr. Finch. They have this on a screen that's not facing me, and I can't see it. So hold on one second, please.

(Pause)

THE COURT: Okay. Thank you.

MR. FINCH: I'll focus on the mesothelioma. That's Grace's history of how many mesothelioma claims it got. Nobody really disputes that. It's a continuing upward trend. Whether you want to go back to 1980 or 1990 or 1995, it's a continuing upward trend. Mr. Bernick makes a big deal out of the 2000/2001 period, but, in fact, the trend was apparent long before that, and it's continued to go up.

Well, we have also Dr. Peterson and Ms. Bigg's knowledge about the litigation environment. We have the Rand report on asbestos litigation which has the total numbers of claimants, various broken down by disease, and this -- you know, Mr. Bernick said, oh, there aren't new claimants coming in the system. Well, he's just wrong about that. You can see from the 1990 all the way up through 2002 there's more claimants coming into the system for mesothelioma. So that's

the pattern for the data that we have. And so Dr. Peterson and Ms. Biggs, to a greater or lesser extent, say, okay, we don't have data for Grace after 2001, but we know the trends are up. We know there's an upper limit, which is in the Nicholson disease curve, whatever percentage of that. So there's nothing that says that there's going to be a reversal of the trend in Grace.

We do have data about the market generally, and the reason people focus on the Manville Trust is, because ultimately the Manville Trust gets 90 or 100 percent of the asbestos claims. And the Manville Trust data shows that even if you leave out 2003 for the U.S. exposures for mesothelioma, the numbers and claims the Manville Trust were getting between 2004 and 2006 are about 20 percent higher than the last three years to which we would have Grace data, which is 1998 to 2000. And so people use the Manville Trust as a benchmark in non-litigation settings as well as litigation settings.

I mean Dr. Dunbar, in a presentation he made to a bunch of financial analysts, looked at the Manville Trust as sort of a proxy for the market. Just like when you're valuing a company, you look at the S&P 500 or the Dow Jones Industrial Average as a proxy for the market. Well, you look to the Manville experience here.

And so Dr. Peterson, using his expertise and his knowledge and the knowledge of the trends, takes that and

projects the future liability using Grace's historical values taking into account the fact that just like its claim numbers were going up the values were going up not just for Grace but for many asbestos defendants. And the -- you know, they say they have confidential data that shows that claim values have declined somewhat.

One thing I would caution Your Honor is that in viewing the evidence and listening to the testimony, they tend to mix apples and oranges. So they go back and forth from mesothelioma only to all types of claims and all values. It's certainly the case that non-malignant claims have declined substantially over the past three years, but the mesothelioma values, there's no real evidence from any kind of publicly available public source. Companies don't break out their mesothelioma settlements in their financial statements.

The one thing we do know, if you turn to Page 29 of Dr. Peterson's report, this shows Grace's history at the top. Keep the whole page, John, the whole thing. Grace's history at the top, which shows increasing mesothelioma values, increasing lung cancer values, and what Dr. Peterson regards as comparable companies. These are companies that were in the construction industry that made construction-type products, USG, Turner, and Newell.

And if you look at the bottom, there's a company called Union Carbide, which has become one of the dominant

asbestos defendants today. And if you look at the dollars out the door -- this is from Union Carbide's financial statements. It's publicly available. Dollars out the door, which is really what we're trying to figure out here. Look at the dollars out the door Union Carbide was paying in 2001, which is $39 million, compared to the dollars out the door it's paying now, which is about $120 million. It's tripled, and there were some years it was paying two or three hundred million dollars a year.

So the idea that in the tort system companies are in some kind of much better world I think is refuted by the evidence and refuted by the testimony of the knowledgeable witnesses, and I would urge Your Honor to listen to Dr. Peterson's testimony, listen to Ms. Biggs' testimony, and focus on the point that even under Grace's methodology they're predicting what's going to happen over the next 40 or 50 years. Sure, nobody can predict what the stock market's going to do next week or next month or next year, but over the past 100 years the S&P 500 has gone up an average of 8 or 9 percent a year. If you're trying to do a forecast of the next 30 or 40 years, you look at the long-term trends, and it would be a pretty good estimate to say I believe, all things being equal, 20 years from now that the whole market is going to be 20 percent higher -- I mean ten -- eight percent higher per year going over 20 years than what it was today. And so you start

with the most recent period, and you project forward.

And, finally, Your Honor, I'll wrap up my time, so that Mr. Mullady can focus on some specific points relating to Ms. Biggs. Grace used the methodology to estimate asbestos liabilities taking its past history in non-bankruptcy settings.

If you could put up the -- Tom Florence's -- excuse me. If you could -- could I have, John, please ACC-89?

This is the estimate that Dr. Florence did for 1997 for business planning purposes at the time of the Sealed Air decision. This will be an exhibit in the case. If you back up one page -- back up to the other one. This is -- if you look at the estimate of the indemnity arising from VI claims as obtained I, that is the exact type of methodology. You know, leaving aside some individual tweaks that Dr. Peterson and Ms. Biggs use and what Dr. Peterson -- what Dr. Florence himself does and contacts other than this case where he's being asked just to count up the numbers.

When Grace -- the management wanted to estimate the liability for pending claims at the same time, which is BD-605, same document, they had 104,000 pending claims. This has been shown in open court before, Ms. Baer.

MS. BAER: There was one that flashed by that wasn't.

MR. FINCH: Okay. This chart was shown in open court, Your Honor. This chart was produced to the United States government pursuant to a subpoena. I don't think

there's any confidentiality left to that.

Grace had 100,000 cases pending in 1997. At the time, as you'll see from Dr. Peterson's estimates, Grace was paying about a third as much in meso cases and half as much as lung cancer cases, and yet they still estimated the liability for pending cases at $325 million, which is almost as much as what they're estimating for all their liability here under their methodology.

And, finally, I will close, Your Honor, with two thoughts. Number one, if Grace believed that this methodology is so unreliable. Why does it -- and we -- in our briefs we pointed this out to Your Honor. As late as December, 2006 it was inviting one of its insurance companies to go look at Dr. Peterson's estimate of liability in order to get money from an insurance company. They said you can go get it. We can copy Dr. Peterson's report from Sealed Air, which estimated liability north of $3 billion as of 1998. We can copy the report, or you can get it from the bankruptcy docket. If Grace thought -- this is Grace's in-house head of insurance. If Grace thought that its -- the Peterson methodology was so unreliable, why does it use it to get insurance coverage, to get money for its -- from its insurers?

The final thought, Your Honor, that I'll leave you with is Dr. Florence's methodology that he uses here and Grace's whole methodology basically identifies the cases where

Grace's experts can see that the plaintiff has a disease that could be caused solely by exposure to Grace asbestos. When a claim is found to be valid under tort law in our system of justice, how much does a defendant pay? The defendant doesn't pay a settlement value. The defendant pays what a jury determines are the damages in the case. And we have evidence of what juries have determined are the damages in cases involving Grace where there is liability.

And I -- we have demonstrated to you and we will demonstrate to you that if you buy into everything else about Grace's methodology, which we disagree with and think is wrong, and contrary to the Bankruptcy Code, if you value what's left by reference of the judgments, which is the only methodology which is consistent with a merits-based estimation, the liability is at least $12 billion. And with that I will turn the lectern over to Mr. Mullady and sit down.

THE COURT: Why don't we take a ten-minute recess, and then we'll start again, Mr. Mullady?

MR. MULLADY: Good suggestion, Your Honor. Thank you.

THE COURT: Okay.

MR. BERNICK: Your Honor, for planning purposes, about what do you have left on the clock (indiscernible).

UNIDENTIFIED SPEAKER: We --

MR. BERNICK: I think you started about --

(Recess)

THE CLERK: Please be seated. Will the Court come to order?

THE COURT: Mr. Mullady.

MR. MULLADY: Thank you, Your Honor. Good afternoon. If it please the Court, Ray Mullady for the Future Claimants Representative.

THE COURT: Just a minute, Mr. Mullday. Moana, do you know how to turn that off? Do you -- the fan off --

THE CLERK: Just turn the --

THE COURT: -- that button off? I'm going to turn it off, so we can hear you, Mr. Mullady, other -- and I apologize, folks. It'll probably get hot. If some -- if you really start to die, let me know, and I'll turn it back on, and we'll not hear Mr. Mullady too well, but, hopefully, that won't change. That should shut down in a few minutes. Go ahead, Mr. Mullady.

MR. MULLADY: Thank you, Your Honor. Good afternoon. Once again, Ray Mullady for the Future Claimants Representative, who is Mr. David Austern, who is in the courtroom today seated back there next to Mr. Frankel. He may have to get up and leave during my presentation. It's not out of disinterest, but not coincidentally in connection with his duties as claims administrator for the Dow Corning Trust, he has an obligation to attend to later.

MR. BERNICK: Which that client is very grateful.

MR. MULLADY: I'd like to begin, Your Honor, by reminding the Court of the magnitude of Grace's liability to future asbestos personal injury claimants. By the consensus of all of the individuals who have estimated Grace's liability in this case, the future claims liability is over 80 percent of the total liability. Ms. Biggs has it at 90 percent. Mr. Peterson has it at 89 percent. Even Dr. Florence, whose estimate obviously is much lower, has it at 82 percent. And Grace in its SEC filings most recently, it's 10k for the period ending 12/31, 2000, projected that 84 percent of the liability would fall in the future years.

Thus, Your Honor, if Grace's liability for asbestos personal injury claims is channeled to a Section 524(g) trust, by everyone's consensus over 80 percent of the assets in the trust will be used to pay future claimants. For this reason, the due process rights of future claimants who are absent parties here are paramount. The U.S. Supreme Court has long recognized that constitutional due process limits a court's ability to rule on the merits of the claims of absent parties. And that case is -- the case cite is Hansbury vs. Lee at 311 US 32, a 1940 case.

Thus, Your Honor, the due process rights of future claimants limits this Court's ability to estimate Grace's liability in a way that would involve ruling on the merits of future claims. That's very important, yet this is what Grace's

estimation methodology contemplates. The Bankruptcy Code also insures that the rights of future claimants are protected in cases involving a 524(g) trust, as the Court knows. That section provides that the trust, "will value and be in a position to pay," present and future claims, "in substantially the same manner."

So we've heard a lot about merits-based estimation, but make no mistake Grace's estimation methodology does not assess the actual merits of future claims. Instead it arbitrarily eliminates thousands of future claims and in the process tramples the due process rights of claimants that we just talked about. Can we have Exhibit 4, Tom?

This is a chart from Grace's Daubert opposition brief at Page 32. The sliver of pending claims after Grace's winnowing process is shown right down here. They start with pending claims here. They eliminate those without a proof of claim. They further eliminate claims that do not meet their exposure criteria, and this last one here, no asbestos-related disease. So what starts as a pending group here of claims, becomes this tiny sliver here. Exhibit 5, Tom, please.

After this winnowing process is completed, we have the future estimate down here. The Nicholson disease inputs curve is up here. The only way this delta gets as wide as it is in the Grace estimation is if history is completely disregarded and new criteria are imposed to screen out claims

that Grace traditionally paid pre-petition. And that is the vagary of the process that they are using here with respect to future claimants. So as to future claimants, the screening process begins with the Grace PIQs, which were not completed by future claimants, so the Court has no data on individual future claims, only assumptions by Grace and their experts as to the number of claims that will be filed, and a second assumption, an unscientific prediction, about how many future claims will be meritorious.

Now, we know that Dr. Florence allocates zero value to thousands of future claims. This is undisputed. He does this by failing to include large numbers of claimants in the claim base that he uses for his future projections. But, as we will see, his exclusions are unfair and deny claimants -- excuse me -- future claimants their due process rights. Exhibit 6, please.

Now, Your Honor, this is a demonstrative. It's a little bit playful. I hope Your Honor will give me a little creative license here. But the concept is very, very serious, and this is the best way I thought we could depict this. What we show here in this first cut is a hypothetical game board. The players are current asbestos personal injury claimants. The object of the game is to reach the 524(g) trust here and be eligible for compensation. Hypothetical future claimants are shown here awaiting the outcome of the game, because under

Grace's estimation methodology their fate is dictated by the ability of future claimants -- excuse me -- current claimants to reach the finish line here.

So the first player begins and gets to the first question did I file a POC, a proof of claim. He did not, and his claim is not paid. The future claimants are affected by this denial, because the exclusion of this player and many other players who did not file a proof of claim or the many who did file proofs of claim that Dr. Florence could simply not match to the CMS database, they're all used to under estimate the number of future claims. This in turn results in fewer assets being allocated to the 524(g) trust under Grace's estimation, and note that the money bag has shrunk somewhat.

Our next player proceeds through the claim filter but is asked whether he entered his claim in CMS before the petition date. He answers no, and he's denied payment. The 524(g) trust shrinks even more. Future claimants ask themselves why the value of their claims suffers as a result. They didn't have pre-petition claims. They were not responsible for Grace not timely entering claims into CMS.

The next player, he's asked whether his PIQ said that he personally mixed or personally installed a Grace asbestos product. He answers no. His claim is denied, and future claimants ask the question why should we be affected. We didn't file a PIQ. His PIQ said he didn't personally mix or

install. We weren't sent PIQs. We aren't bound by Grace's exposure criteria by any court. Even if in the future a 524(g) trust is established, what are the odds that Grace's exposure criteria will be used? They're not the law that they state, and the trust criteria will have to be negotiated between the debtor and the personal injury claimants and the futures rep. Next, please.

The next player gives the wrong answer to the question whether he identified a Grace product in his PIQ response. He's sent to the do not pay category. The trust shrinks further. Future claimants wonder why they are being affected by the response of a claimant to a PIQ where the claimant's case had not been fully developed at the time of the Grace bankruptcy petition and where the automatic stay prevented that claimant from taking any discovery against Grace.

The next player is a pending claimant who did not comply with Your Honor's x-ray order. My goodness, we heard enough about that order over the last two or three years. His claim is denied. The trust shrinks further. The future claimants ask themselves why their recovery's been diluted. They weren't subject to the Court's x-ray order.

When all is said and done, Your Honor, and, of course, many claimants can pass through the various Grace liability filters and make it to a position where they're

eligible for payment under the trust, but for every claimant that doesn't make it, numbers of future claimants by extrapolation for the Dr. Florence methodology will not receive full compensation for their claims. And at the end of the day the money that is not paid to the future claimants is returned Grace shareholders. It moves over there. And what was once the province of future claimants becomes the province of Grace shareholders. This is the game that Grace is playing here, and this is why we thought this demonstrative was a good way to depict it.

The future claimants, Your Honor, will submit their claims against the trust over the next 50 years. This Court is bound to estimate Grace's liability by taking into account the future and as yet unasserted claims against Grace, and those claims must be treated fairly and equitably. As we just saw, Dr. Florence's methodology does just the opposite.

Now, of course, Dr. Florence disclaims all responsibility for the assumptions that underlie his calculation of the number of pending and future claims. He instead follows the lead of Dr. Elizabeth Anderson, who opines that certain categories of claims, as we've heard, have insufficient exposure to Grace products to have a plausible claim against Grace.

Dr. Anderson eliminates all claimants except those who personally mixed or personally installed Grace asbestos

products, as we've heard. Moreover, she does so in an unscientific way, as I will discuss in a moment.

Now, Dr. Anderson in turn relies on Dr. Peter Lees, who has computed the asbestos exposure rates for various classes of Grace workers, but remarkably and unscientifically, Dr. Lees does not even report the variations from the averages that he calculates. That's an important point.

Now, Dr. Anderson also relies on Dr. Mugavkar. He's the one who's collected the benchmark exposure levels to asbestos that, according to Dr. Anderson, are then necessary to attribute asbestos-related diseases to the exposure. Now, we submit we've argued in our Daubert papers that Dr. Anderson's opinion that only workers who personally mixed or personally installed Grace asbestos products could have been exposed to sufficient levels of asbestos to cause disease. We've argued that that opinion is unreliable and inadmissible.

She arrives at this opinion by improperly assuming, Your Honor, that the average asbestos exposure of cohorts in each of the PIQ categories -- those categories that Mr. Bernick referred to, A through F. She assumes that the average exposure of the cohorts in those categories is representative of all workers in that category. She does not account for individual exposure levels at all.

So, for example, Dr. R.J. Lees underlying data shows that the average exposure for a worker -- quote, worker -- is

much higher than the exposure for a, quote, helper, and that only makes sense, because the worker is more directly working with the product than the helper in the same job category. Yet Dr. Anderson uses the average of the workers and helpers, so that, of course, dilutes the workers' exposure, and by doing this what she does is she eliminates workers even though the average exposures for the workers over 45 years exceed her thresholds.

Now to make things worse, she ignores the fact that not all workers in a category have average cumulative exposure. Some have much higher than average cumulative exposures, but she doesn't consider this, which is surprising. If Grace is to be believed that what they're doing here is determining the merits of individual claims on a claim-by-claim basis, then she should be considering these claimants individually and not grouping them and using averages.

Now, Your Honor, this is a complicated area of the case. It requires some study. We recommend that the Court carefully read the declarations of Professor Eric Stallard that are attached to the FCR's Daubert papers. Professor Stallard's an expert in demographic risk modeling. In his declarations he explains the importance of accounting for heterogeneity, which is the differences in individual exposures, and he explains how important it is to account for heterogeneity when studying the exposures of individual members of a population, which is what

Grace purports to be doing here. Instead, Dr. Anderson's calculating average exposures and ignoring everyone above the average.

Now, Professor Stallard also exposes as unscientific and flawed Dr. Anderson's assumption that workers in the same job categories will have, quote, independent exposures. Now, this is a different concept, but it's equally important. So, in other words, she assumes that each day that a worker in one of her groups comes to work, and he has an equal chance of doing any of the jobs in the work category as any other worker just as every flip of a coin has an equal chance of coming up heads as it does coming up tails. That's the independence assumption. So under Dr. Anderson's assumption an exposed worker has an equal chance of doing the job of a helper on any given day, and that's just counterfactual.

Dr. Stallard explains why the independence assumption is not scientifically valid, and it's not consistent with accepted scientific practice for the purpose of rejecting individual claims on the premise that they have insufficient exposures to asbestos to cause disease. Your Honor, this is very important. If Dr. Anderson's independence assumption is wrong, then her exclusion of thousands of claimants is wrong, and Dr. Florence's estimate is wildly inaccurate and unreliable.

I'd like to talk about Ms. Biggs' methodology. We

heard some commentary about it this morning, but let me tell you a little bit about Ms. Biggs. She'll be here to testify, but it may not be until March. She'll be testifying in our case in chief. Can we have that still, Exhibit 8?

This is Jenni Biggs. She's a principal of Towers Perrin. It's a leading actuarial firm. She leads the asbestos practice of that firm's Tillinghast Division. Her long list of credentials includes having qualified the potential asbestos liabilities for insurers, for reinsurers, for asbestos defendants. She's the co-author of the Tillinghast study regarding the $200 billion asbestos universe that was published in 2001. She's chaired the American Academy of Actuaries mass torts working group which created a public policy monograph on the overview of asbestos issues and trends, which was originally published back in Decmeber of '01 and was updated just last summer in August. And she's testified before the Senate Committee on the Judiciary on Asbestos Issues.

Now, Grace's attack on her is that, you know, she's unscientific. She hasn't done peer review work. There are no standards governing her work. It's not generally accepted. All those charges are false, and we demonstrated this in our papers, but I'd just like to mention a few reasons why those are false assertions.

Her actuarial estimate bares all of the key hallmarks of a reliable methodology that's admissible in federal trials.

It's based on published peer reviewed modeling concepts, and you will hear about those. It was prepared in strict compliance with the standards of actuarial science. It's closely related to estimation methodologies that have been accepted by courts in prior estimation proceedings, and it's long been relied on in non-judicial settings by insurers, reinsurers, and solvent asbestos defendants when setting billions of dollars in asbestos reserves. So unlike Dr. Florence's methodology, which was created for litigation and has never been used even by himself outside of litigation, Ms. Biggs' work finds equal place outside the courtroom as it does within, which is one of the criteria and key indicia of reliability under the Paoli decision in the Third Circuit.

Can we have Exhibit 9, please? There are standards governing what actuaries do, very specific standards, very exacting standards. This is Casualty Actuarial Society definition of what actuaries do. They're known for their scientific approach and demanding standards.

Can I have 10, please? They apply their mathematical expertise, and Ms. Biggs was a math major, and she has a degree in mathematics. Their mathematical expertise, their statistical knowledge, their economic and financial analyses, and problem solving skills to a wide range of business problems. They estimate the costs of uncertain future events. That's what we're here to do. We are here to estimate the cost

of uncertain future events. To hear Grace discuss the subject, that's not possible. One can't do that and be scientific. Actuaries would beg to disagree.

Can we have 11, please? More importantly, Your Honor, Ms. Biggs' work is governed by the Actuarial Standards of Practice. This is -- or ASOPs to use the acronym. Actuarial Standard of Practice 12 provides that, "An actuary should select risk characteristics that are capable of being objectively determined and based on readily verifiable, observable facts." Ms. Biggs will testify that her estimation methodology complies with these and other ASOPs.

Let's go to 13. As we noted -- well, I haven't noted it yet, so I'll note it for the first time, Ms. Biggs' estimate of the liability in this case -- her best estimate is $3.8 billion discounted. How did she arrive at that figure? Grace claims that he made a bunch of ad hoc judgments, and that her estimate is the product of assertion and not scientific analysis. That's from their brief -- their reply brief at Page 32.

Well, let's review what she did. She has a six-step methodology following a peer reviewed actuarial model. You heard Mr. Bernick make reference to the peer reviewed basis for the model this morning in his opening. This is the peer reviewed methodology she followed. Step 1 was to compile basic claims information, and she started with Grace's own CMS

historical data base, which Grace developed in the 1980s and has used it throughout the years to track the hundreds of thousands of personal injury claims. This is actual historic data.

Next, please. What she first had to do was there were all these disease categories in CMS. She consolidated all the non-malignant claims down to one category of non-malignant which left her with seven categories of disease types. Ultimately, that gets reduced to four, as we'll see in a moment.

Next, please. But what she found was that in CMS there were many, many missing records. For some claimants social security numbers were missing. For many, many claimants disease information was missing. So rather than be content with less than a robust database to use at the juimping off point for her estimatation, she went to the Manville database and matched claimant by claimant, a very meticulous process of bringing over the information that was not in CMS to fill out the data on these claimants. And along the way she made many conservative assumptions and selections. Grace refers to them as ad hoc judgments. She had to make judgments about how to do this, and I think you'll hear that in many more cases than not she took the most conservative judgment that would enure to Grace's benefit and to her client.

To fill in some of these other holes, she looked at

the PIQ POC database and match further to that. And at the end of the process she came up with one complete data set of claims.

Let's go to Step 2. And that completed her compilation of basic claims information. The next step was to estimate future claim filings. This is a chart with respect to mesothelioma future claim filings. This graph shows the number of mesothelioma claims that were filed along -- and on the vertical axis the number and then the years in which they were filed. The upper line is Ms. Biggs' industry benchmark which is based on research that -- and data from Tillinghast. Mr. Bernick said this morning that there's no company data in the Biggs and Peterson models, and I think with respect to Biggs, he was referring to this industry benchmark data. Well, that's just false.

The Biggs industry benchmark derives from corporate defendant disclosures, from SEC filings, from Tillinghast confidential client data, and various public information such as the en banc database, which is itself a collection of data gathered from courthouses all over the country on the number of claims that are being filed, and that is truly representative of what's happening to the industry. So the industry benchmark is a compilation of what's happening outside the world of Grace. She also looks at Grace's actual filings over a historical period.

Now note this shaded area here between 1997 and 2001. Starting with roughly 1997, Grace had moratorium agreements with various plaintiffs' firms. Certain plaintiffs' firms in exchange for group settlements were agreeing not to sue Grace for a certain period of time. This tended to dampen the number of filings in the late 1990s, as you can see here. And then, of course, the claim filings go up in 2000, as Mr. Bernick explained.

Next slide, please. These are the moratorium agreements that expired in 1999 that are highlighted in yellow. You can see how many there were. Where now these firms are backing the business, theoretically at least, of suing Grace. And so, of course, it stands to reason that once these moratorium agreements end we see an upswing in claims against Grace.

Mr. Bernick asked rhetorically why Ms. Biggs has selected 1997 -- strike that. Let's go to the next slide, please. There's a calibration period here that Ms. Biggs uses for purposes of her estimate of future claim filings. The calibration period is '97 to 2001. Mr. Bernick said it was an arbitrary choice that she made to use those years, and it reflects selection bias is what he said. Well, that's not true either. She chose that period to account for the aberrations in the annual ratios of claims that were filed due to the moratorium agreements that Grace had with these plaintiffs'

firms which tended to understate claim filings in the late nineties but then led to a surge of claim filings in 2000 and 2001. So to correct for the annual aberrations she selected shares based on the '97 to 2001 calibration period.

Interestingly, Your Honor, when she testifies here, you can ask her if she had gone back to 1992 and used the calibration period from '92 to 2001. Let's go to the next slide, please, Tom. One more. She calculates ultimately that Grace had 58.4 percent of the total industry claim filing experience. In other words, more than half of the claims that are being filed are included in Grace. If she had used her calibration period going back to 1992, it would -- Grace's share would still be something north of 50 percent -- in the low fifties somewhere.

Okay. Let's go to the next slide, please. Okay. Let's go further. I'm trying to get to the next step after she's estimated the future claim filings showing Grace's share in comparison to the industry benchmark and Grace actual. One more. She has to look at -- she has to estimate the data first exposure. Well, she has to factor in the data first exposure and use the decay rates that Mr. Bernick mentioned that were given to her by Professor Stallard. And but this series of graphs shows -- and we'll go through these quickly, Tom -- is that because Grace was introducing asbestos products later than most other defendants and these years reflect when people are

being exposed to asbestos -- and you can see that the later the exposure, the later the claims are being filed in time, and that they don't run off until around 2059, according to Mr. -- Professor Stallard.

Next one, please. This is their total industry, and you can see the shape of the curve on the run off that Stallard has calculated.

Next. And this is Grace's share. Note how this difference between the green and the blue gets narrower as we go forward in time. And this is showing how Grace's later dates of first exposure are producing claims against it in the future for much longer than the rest of the industry.

Let's go to Step 3. She's got to now estimate claim dismissals. Obviously, Grace isn't going to be expected to pay every claim. They didn't pay every claim in the past. They're not expected to pay every claim in the future. Ms. Biggs calculates dismissal rates for non-malignant and malignant claims separately, and she does it by jurisdiction. She uses the jurisdiction's medical criteria. She looks at judicial legislative changes to such criteria and Grace's actual history of claims resolution. For malignant claims, she starts with historical dismissal rates by disease and by jurisdiction.

Next. And she assumes that the same dismissal rates will apply in the future. In other words, there's nothing in the changes in the legal system that are going to cause Grace

to dismiss or not pay more malignant claims in the future than they did in the past. Now, it's a different story with non-malignant claims. In the past Grace was dismissing a small percentage of those claims. Ms. Biggs has calculated and determined that in the future going forward Grace's dismissal rate on non-malignant claims is going to be much higher. For example, in the State of Mississippi Ms. Biggs assumes that the dismissal rate for non-malignant future claims will be 99 percent after 2004. So that's Step 3.

Step 4 is to calculate the average payment values. What she does here, as with her dismissal rates, she calculates average payment -- value payments by disease type and jurisdiction. She starts with the historical values that Grace was paying, and then she considers factors that are expected to either increase or decrease those values over time.

Now, Mr. Bernick -- and, of course, these are shown here on this chart, historical trends, increases in plaintiff demands, and so forth. Decreases, tort system changes, she's factoring in the lack of a broken tort system and claimant aging. Now, Mr. Bernick displayed some charts this morning showing mesothelioma claim values and how those have been trending recently. An example was the one at Page 57 of the slide copies that Your Honor handed up -- were handed up to Your Honor by Mr. Bernick. That's the one that says Peterson Mesothelioma Settlement Values.

One line of that chart shows the average settlement value of confidential companies studied by Dr. Dunbar, and it shows a downward trend over the last few years. Well, but Ms. Biggs has confidential client data as well. If I can switch -- could I switch to the ELMO for a minute? Is that possible?

(Pause)

MR. MULLADY: Okay. This is a little bit hard to read on the screen, Your Honor. I apologize for that. I'll see if I can make it clearer.

The three different examples that are provided by Ms. Biggs -- is that going to work? Yea -- here, Example 1, Example 2, Example 3, there's actual Grace, and then there is selected Grace. And what is this -- what does this -- what is this telling us? Well, it's telling us that of the confidential company data Ms. Biggs studied what we see here is far from falling off a ledge in terms of values the way Mr. Bernick claims the data show. There are some defendants here that actually experienced increases recently. This little spike here and another one right here, those are upward trending values for mesothelioma claims.

And Grace is down here. Her assumption for Grace is this green line, selected Grace here. So I think you'll see when she comes here that she's made very conservative judgments about the values of mesothelioma claims. It's consistent with the data that she has, and, obviously, there's a little bit of

a dispute here between Dr. Dunbar and Ms. Biggs about what the confidential company data is showing on mesothelioma values. But there's no denying, from the chart that Mr. Finch showed the Court this morning, that mesothelioma values have been going up for some time.

The last step -- if we can go back to the regular screen? Take this down. There are two more little steps in her calculations. Step 5 of her methodology --

(Pause)

MR. MULLADY: Step 5 is where she calculates the future and pending claim liability. She does this by year. We're showing 2002 just as an example. She takes the number of claims estimated for that year. She then eliminates claims based on her calculated dismissal rates by disease type and by jurisdiction.

Next, please. And that leaves the claims on which Grace would be liable to pay or the claims to pay. And she next averages or applies the average payment value that was calculated for the year in question, and she multiplies the two variables, the claims to pay by the average payment to get to the total liability.

Next. She does this for each and every year of Grace's future liability, all the way to 2059. We won't show every year.

Next, please. Resulting in -- no, I'm sorry. We

have to go back just to -- we got a little ahead of ourselves. Should have -- okay. One more. Is that it? Okay. That's Step 5.

Step 6 is to calculate the cash flow. Grace's total liability showing here on an undiscounted basis of 8.9 billion. And based on the general time value of money principal, Ms. Biggs applied a 5.25 discount rate to all future cash flows for each year. This process yields -- and this is again showing it year by year and how it works. This process yields a total discounted liability for all asbestos claims of $3.8 billion.

The $3.8 billion -- if we can go to the next slide -- is broken out in this table by four disease categories that Ms. Biggs reduced her claim matching to as set forth in these column headers. And you'll note -- if we can bring up the next image? You'll note, Your Honor, that 68 percent of the total discounted liability of Grace, some 2.6 billion of the $3.8 billion is for mesothelioma liability. This is why Mr. Bernick said this morning all of his slides focus on mesothelioma for this reason right here. That number alone, that $2.6 billion, is five times higher than Dr. Florence's estimate for all claims, for all disease categories combined.

That's the magnitude of the difference in the estimated liability that Grace seeks to impose through its methodology. That difference overwhelmingly impacts the future claimants. Thank you, Your Honor.

THE COURT: Mr. Bernick.

(Pause)

MR. BERNICK: Your Honor, I'm going to proceed in reverse order and begin with the remarks that Mr. Mullady made on behalf of the Futures Representative, and I'm just going to go through the -- pretty much that sequence, but I want to make sure that I return back to some of the legal questions that Mr. --

(Pause)

MR. BERNICK: How about that? Is that better? Because I agree with Mr. -- Mr. Lockwood that, in fact, the legal issues are very dominant issues and warrant the Court's attention, because they drive an awful lot of what then appears in the -- in the detail alone.

With respect to Ms. Biggs, the observation was made that this is an analysis or a method that's not done for litigation purposes like Mr. Florence's method is. And, in fact, we would submit, Your Honor, that the shoe is on the other foot. That Mr. Peterson's methodology, which, after all, is actually prior in time to the Tillingnhast methodology and set the model, in fact, was developed principally for litigation purposes that isn't the context of disputes or confirmations in court per claim.

Whereas, Dr. Florence's approach is not Dr. Florence's approach. That is a mistake that is made frequently

-- has been made frequently in the remarks here this afternoon. Dr. Florence was the person who implemented the approach in terms of looking at the data that satisfies the criteria that were set by the scientists, which criteria are, in fact, the criteria of science. That is what hasn't been developed in the courtroom.

There's a criteria of science that are dominant and authoritative outside the courtroom and structures the entirety of Grace's approach, whereas, if you look for those same principles and criteria or the same analysis with respect to the plaintiffs' estimation, it is not to be found. Mr. Mullady says that, well, gee, actuarial standards were designed to deal with uncertain future events. We would recognize that that's true. It just is a problem and a problem that's fundamental to Ms. Biggs' analysis that in her case neither modeled nor addressed future liability issues, that is legal liability issues, nor was she qualified to develop such a model, nor does she have a model, in fact, that even looks to the future events that she purports to measure, which are not liability issues but settlement activities in a way that follows the rule of science.

The actuarial standard is read and is was very, very clear. It's general. It gives broad permission. The issue is whether that method -- those standards, as applied in this conduct -- context, meet the testing requirements of science.

She says she's -- she was attempting to be a scientist. Dr. Stallard says the same thing. If you are going to measure either settlements or future disease, you have to do so scientifically. The actuarials do not forgive you from following science. They permit you to follow science.

With respect to peer review, reference was made to peer review, and again there has been no external peer review of the model that you will hear about from Ms. Biggs. The only article that was made reference to is an older article. The older article -- if we could have the ELMO for just a second? It's right here. It's revealing, because when it comes to the model that's being used -- it's hard to read here, but the model that's being used simply uses selected annual severity trends and trend severity, and it's basically arithmetic. That trend were -- nowhere considers under this article any of the elements of her model, nowhere considers an industry benchmark, nowhere considers epidemiological trends of any kind, nowhere considers Manville, nowhere considers propensity. All it does is to look for a trend -- a very general trend. This paper in no way, shape, or form even reveals publicly what her model was much less constitutes a peer review.

Mr. Mullady sought to correct the statement that I made where I indicated that Ms. Biggs' were -- her propensity were -- was not based upon public companies but rather the Manville Trust. Mr. Mullady says, well, the industry benchmark

did consider other companies. Yes, it's true. With respect to the historical industry benchmark, that was based upon Manville and other companies. The key is what is the future trend, and when it comes to the future trend, the future trend that drives this curve that is at issue, that curve -- the shape of that curve is purely and simply a function of the Manville trust taken first as a smooth process then as a (indiscernible) then as a decay process never before seen the light of day.

There was reference made to the moratorium agreement by way of explaining why the propensity of rates may have shifted. Ms. Biggs did talk about that in her deposition and report. She did no quantitative analysis that demonstrate that the dip that took place in propensity or the spike was in any way, shape, or form actually a function of the moratorium agreement experiment. She simply said it and didn't do the analysis. Dr. Dunbar did do the analysis. The analysis shows that that theory is false.

With respect to the selection of 1997 as the period for calibration, that was purely and simply her judgment. There was no statistical testing. She didn't pick it out in order to put boundaries on moratoria. She picked it out to out balance in some rough fashion the fact that there was this huge aberrational spike. But, of course, it wasn't sufficient to do that. She says or Mr. Mullady says that the date of first exposure analysis indicates that because Grace products were

later in exposure, the whole curve should be shifted all the way out to 2049. In fact, according to the Nicholson analysis, which drives Dr. Peterson's work, the continuing resonance of the alleged date of first refusal -- first exposure requirement should end about 2027 not 2049.

There's reference made to confidentiality -- this confidential client data. It's true that we knew it was confidential client data, but what's different about our analysis is that the confidential client data has actually a deploy of curves. She looks at confidential client information and then doesn't deploy the curves. She uses rather the propensity, which is based upon the Manville analysis. And further, our confidential client information is then confirmed and verified by publicly available information from both the SEC filings and the very prominently important solvent continuing companies in the tort system.

That then brings me to Union Carbide. There was a statement that was made with respect to Union Carbide. Yes, Union Carbide was considered by Dr. Peterson, maybe even been considered by Ms. Biggs, but only as of 2001 neither one of these individuals had taken the most solvent company still in the tort system and actually plotted what its experience is. We had to bring that out on cross examination of their expert. It turns out that the Carbide experience is going down. The bubble is -- the bubble has burst.

Finally with respect to the analysis of Ms. Biggs, it was pointed out at great length in connection with her -- at great length it was pointed out by Mr. Mullady that somehow there's a due process problem in any effort to some of the assigned future values or future demands at zero value is a due process problem, but yet his own expert by his own admission -- that's what the graphics indicated -- basically takes people out of the equation, and there's a reason for it. Due process does not require that you over fund or give people rights that they don't have, give them values that they don't have. Due process requires -- is a procedural requirement. It doesn't actually indicate that you must come up with a value in any way, shape or form.

Talking about Ms. Andersion, a reference was made that Ms. Anderson uses an average rather than an accounting or individual variation than the concentrations that individual workers might experience, and, in fact, Ms. Anderson did use an arithmetic mean, and the real issue is did that introduce bias. That is because she used an arithmetic method that contemplates that there will be elements -- there will data on both sides, but the mean is still representative if you have an appropriate distribution. The statement was made this is counterfactual. That there are people who, in fact, have higher exposures and lower exposures. The interesting thing is that's a statement that's made by Mr. Stallard not on the basis of anything.

There's not a single data point -- there's not a single distribution analysis that's been done by the other side at all. This is simply a theory. It's not counterfactual. This is, in fact, the way things are done. They don't have data that says otherwise. In fact, the EPA actually and clearly said that the average concentration is the most representative. This is an EPA publication, 1992. This is standard affairs, standard approach. The EPA uses it all the time. Dr. Anderson worked for the EPA. It then turns out that, of course, Dr. Stallard did not.

Finally with respect to remarks that were made by Mr. Mullady. He says that we assign no value to the future -- to certain futures as if, of course, all futures must have some value. There's no requirement in the Code that all futures must get some value. The only requirement in the Code is that futures be treated in the same fashion as the currents. So whatever the appropriate treatment is for the currents, that is the entitlement of the futures. They're not entitled to any less, and they're not entitled to any more.

And that then brings me to the game board, and all I've got to say about the game board is -- that's the wrong board. It's the wrong game. That board describes nothing that we're doing in this case. We are not doing anything that says with respect to futures you can't get this, you can't get that, you must file this, you must file that. That will be

determined by a plan. The plan will spell that out within the limits of the law. In fact, the plan that's on file doesn't actually hamstring the treatment of the futures in any way. What it says is that futures will not be obliged to settle or to litigate. They will have an option. Current claimants will not be obliged to settle or litigate. They will have an option. So no criteria are being imposed upon them in advance. If they want to, just like the current claimants today, they can litigate. That is entirely within the purpose and intent of the Code.

That then brings me to remarks that were made by Mr. Finch, and I will be brief with respect to Mr. Finch, because I do only have a couple minutes to talk about the law. With respect to Mr. Finch, he says, well, now, Dr. Peterson, we said that there weren't more claimants, but, in fact, there were more claimants coming into the system. We never said that there weren't more claimants. What we said is that you can't account for the increaed propensity against Grace by new people coming into the system. You can only count for them by having -- that is magnitude in spike by the same number of existing claimants actually proceeding against Grace and other companies that they wouldn't have been proceeding before. It's the whole idea of the same basic number, maybe slightly increased, increesing the number of people that they sue thereby driving up the propensity of all the defendants.

Mr. Finch indicated, well, we used Johns Manville, because Manville gets 90 to 100 percent of the cases. That's the whole problem. They're treating Grace as if Grace is liable for all of Manville's liability. Manville accepts liability for all products, not just Grace, for everybody. So by treating Grace the same way as Manville, we are treating -- they are treating Grace as if it's responsible for the asbestos liability stemming from any exposure whatsoever.

Mr. Finch says, well, we did look at other -- Dr. Peterson did look at other companies. USG and Turner and Newell as of 2001. Well, that's intersting. USG was on the verge of bankruptcy in 2001. Turner and Newell through Federal-Mogul was on the bridge of bankruptcy in 2001. What about companies after 2001? Dr. Peterson didn't consider a single company after 2001. All he considered was the Manville Trust.

Union Carbide in 2001 -- Union Carbide was -- had just been basically targeted by the plaintiffs' bar. Their propensity was skyrocketing. What about Union Carbide in '03, '04, and '05 when they got control of their litigation, and the propensity against them fell like a stone? Nowhere considered by Dr. Peterson.

What about Grace? Mr. Finch says, well, late in 2006 insurance executives at W.R. Grace actually sent the Peterson report to the insurance companies, thereby indicating, oh,

well, I guess we're signing on to Dr. Peterson for purposes of the insurance reserves. That's completely false.

That memo, which we will show to the Court, actually said in exactly the same breath here's so and so. Here are some of the Peterson reports. You can follow on the rest of the exhibits on bankruptcy filings along with all of the other expert reports. He's simply saying, you want this stuff? It's here. You can take a look at it. We want our money from you. Yes, actually, it says, "I can copy the Peterson report approximately (indiscernible), or you can find the report and all other filings on the Grace bankruptcy on the Delaware Bankruptcy Court's website."

That then brings me to Mr. Lockwood, and I think Mr. Lockwood has raised some -- an interesting analysis of the law, and I think actually the track that he traces through some of the law, I would agree with a lot. It's just that like their model it deviates at just all the critical parts. He indicates that with respect to these companies, well, why -- you know, it's just crazy. Is this some bright idea? No, the companies have had different perspectives. Armstrong World Industries never set out on the road with these cases to define or resolve through some definition what its liability was. The company made a deliberate decision at the very beginning of the case just for peace and to get the case behind them in part because they didn't believe that their liability picture was such that

it would make a difference (indiscernible) liability. Owens-Corning, same thing. The -- Owens-Corning had done deals with the claimants bar going back to the mid-1990s. They were never going to go into Chapter 11 to dispute liability. Federal-Mogul was so swamped with so many other liability problems, the asbestos problem would've made a difference.

By contrast, USG and Grace -- USG and Grace are two companies that were very robust companies, very solvent companies, and very well high performing companies but for the asbestos. It is not surprise that USG and Grace then decided to go forward and try to use the Chapter 11 to define and resolve the liabilities. USG emerged, Gob bless them, with very, very significant equity after lots of protestations from Dr. Peterson. USG emerged following an effort to define its liabilities, and we know Judge Wolin's opinion in connection with (indiscernible). Grace is going down the same road.

Mr. Lockwood then says, well, what then is the authority that we have for this idea. He cites Dow-Corning and Dow-Corning actually provides a very instructive lesson that I'll cover very briefly. It is true that both sides there asked for an estimation. It is true that Judge Spector there decided no, and that he decided no, because he felt that the most appropriate way to deal with this issue was through actual litigation of the allowance process. He also did, in fact, decide, as Mr. Lockwood indicates, that that litigation would

turn out common issues, and, therefore, it deployed a Rule 42. And it's also true that he didn't decide that, but then it kind of trailed off. He just didn't do it, and that really misses the picture of the key part of Dow-Corning, which is he decided that that would be handled -- best handled by the District Court, in part because the District Court was also handling the Dow Chemical cases that had been transferred to the District Court -- the shareholder cases.

Elsewhere in the MDL where proceedings were under way against other (indiscernible) manufacturers, there was a 706 panel that had been empaneled. So there was a likelihood that at some the District Court sitting in connection with the Dow Chemical cases would take up exactly the same issue, and for that reason he felt it was appropriate to send the whole thing upstairs, which he did. And then the motions for sumamry judgment based on Daubert were pending bofre the District Court. Indeed, I argued them to the District Court, and at that time, because what the 706 panel did -- prices came down in the marketplace. There was a big push by the claimants to reduce their demands, and the case resolved. The plan also wasn't struck.

So what do we see from Dow-Corning? Number one, the allowance and disallowance process focuses on the merits. Number two, estimation focuses on the merits. It doesn't focus on anything else. They're birds of the same kind of feathers.

Different procedures. The same focus, which is the merits. Mass tort is amenable to be handled pursuant to those kinds of procedures. Common issues work particularly on generic causation, although there's nothing there that says it can't be used for what I'll call common issues that affect the specific causation.

So Dow-Corning takes us way down the road saying it's the merits, merits, merits, whether it's estimation or allowance. It also helps, Dow-Corning indicates, that you focus on the merits in order to get plan resolution, in order to get consensus, because it helps focus the controversy and what real liability is.

Dow-Corning also supplies the answer to the other basic question that Mr. Lockwood raised. That basic question is, well, what are we doing here. He says here there's no agreement. That's correct. Here, because there's no agreement, the question that we impose is what's the legal liability. That is what can we be obliged to pay? Yes, that's right. And your answer to that -- that's our position. I didn't hear an answer to that. He then says our view is that 502(b) governs, because that deals with allowance. We said yes, we believe that's right, because it tells us what the standard is. We didn't hear an answer to the 502(b) analysis.

He then says, well, there are a bunch of mechanisms that we put in place, bar date, PIQ, experts. Yes, those are

all mechanisms that are designed to focus on the merits, traditional litigation. Didn't hear any question about that those are not the traditional methods that are used in discovery and litigation. The only criticism we heard is that none of our experts is a lawyer. Well, they don't have to be lawyers. We are the ones that are telling them here's the issue. It's then their job to find out the scientific answer to that issue. Dr. Florence doesn't have to be a lawyer, and we don't have to bring in a whole set of lawyers like Mr. Snyder ot tell us what the stsandard is that ought to govern science, because we're all lawyers. We're capable and the Court's capable of understanding the standards of the law to which the science must fit.

Where is Grace going with its number? That was the next question that was posed. The answer is very simple. Just as Your Honor indicated, Grace is going with its number towards the plan formulation -- plan formulation. What plan? Well, we have a plan on file, but we've been candid that that plan could be revised. We hope that their plan would also be revised. What will that plan call for? We'll see. That's not before the Court here.

However, Mr. Lockwood, inviting scrutiny down the road and kind of looking (indiscernible) and says, well, it's clear right now. There can only be two alternatives. Either the criteria are baked into the TDP of the trust, or if they're

not, more is paid, and the trust runs out of money. He said I can't think of another alternative.

There is another alternative. You don't have to bake the criteria into the TDP. You can use the criteria in order to have a TDP that says if people want to settle it on the basis of those criteria and pricing, that's an option. And if people do not want to settle, they are still free to litigate their claims. And that's an option that is clearly out there. You know what? That's exactly what the Dow-Corning plan did. It set out the criteria. It says you can go in, you can buy in, you can settle, or you can litigate. Here's the case management order. It will all take place in Federal Court pursuant to rules that are applicable in Federal Court. That was the one that was approved over objection. That's the one that's now in place, and I'm happy to tell the Court, as Mr. Austern will be able to attest, that over, over, overwhelmingly the Dow-Corning claimants are not opting for litigation. They're opting for settlement, and the trust has been a successful trust.

Will there be a cap? There may be a cap. If there is a cap, the Code nowhere says we can't have a cap, but it does say that we would have to raise that issue with the District Court. We are not raising that issue now. We are trying to get the estimate out, so we can get a plan.

Very, very quickly a couple of other points, and I'm

done. Daubert. Two uses of Daubert. Mr. Lockwood says, well, gee, what we using it for? Number one, it is a threshold requirement to have any of the testimony that comes in on estimation satisfy Daubert. Regardless of what the claims are, you can't do the estimate unless the estimate is done scientifically. Obviously, it is our view that they don't satisfy the requirements of Daubert, because they don't follow in a reliable methodology. They disagree. That's issue one.

Issue two is, well, what would happen if the cases were litigated pursuant to the requirements of Daubert? That is in a follow on litigation process in Federal Court, which ones would survive? Again, the totally legitimate use, but we do not seek to preclude those claims on that basis.

What about Rule 408? Again there was reference to the Babcock case. The holding of Babcock was that in taking a look at what the past liability was at the time of an alleged fraudulent conveyance you could use the co-temporaneous assessments of settlement liability to determine what it was in that contest is past liability. You could use past settlements.

Here we're talking about something else, which is using past settlements to say here's what the future disputed liability is. That is not what happened in the Babcock case, never spoke to it. Indeed very specifically Judge Brown said nothing that I'm doing in this opinion speaks to the question

of what kind of estimates or what kind of liability determinations will be made at a later stage in this case. There was an indication that somehow the Judge -- Judge Vance rejected the position that we're arguing for here saying it just wasn't feasible. I don't know. I was in that case, and that's not what Judge Vance did.

All of those objections were made in advance. Mr. Inselbrook stood up and gave a passionate speech about how it was infeasible, couldn't be done, and she decided through the bar date anyhow, and she decided through the claim forms anyhow. What happened was we then litigated fraudulent conveyance. We didn't litigate the motions for summary judgment. Litigation for fraudulent conveyances took place. We were fortunate in prevailing. The company then wanted to seek a resolution instead of seeking out how long it would take in court. The Judge never ruled on the pending motions, never said that they were not viable, but the settlement process took over. In fact, I'm sure that Mr. Inselbrook would applaud.

Finally, asbestos -- asbestosis not necessary. This is a point made by Mr. Finch. Asbestosis is not necessary, and this is the point. For those people, either have asbestosis by radiograph or by pathology, it is true pathology is another way to go. We specifically looked to see if there were a lot of pathology samples. There are very, very few. So overwhelmingly the alternative is x-ray. That's why we focused

on x-ray to determine whether the information that was coming from the B readers was sufficiently reliable to be -- pass the Daubert standard.

A statement that was made that Mr. Dunbar somehow does estimation their way, Mr. Dunbar has on occasion done estimation their way when the inputs that are available require it. But when the inputs are different, estimations can be done in different ways depending upon the issues that are posed. And Mr. Dunbar is fully on board with this case with how this case is run.

Finally with respect to Rule 702, Mr. Finch says you don't have to do science under 702. Well, that's true. If you don't purport to be doing science, 702 doesn't apply. They purport to be doing science. Every single one of their experts says I am doing science, and when you purport to do science, you've got to do it.

They say, well, these methods are used not only inside the litigation process, but they're also used outside. And it's true, that would be a consideration, but it's a minimum consideration. That is if you don't even live up to the standards that you have outside with what you're doing inside, you've got a problem. But just because you bring into the courtroom a purported method that you use outside doesn't mean that it somehow satisfies the Daubert standard. Otherwise, if it's junky outside, it qualifies inside. So it

has to be at least as good.

In the same fashion acceptance is important. It should be accepted, but the mere fact of acceptance doesn't make it right. The key thing is what are the standards for science outside and inside, the standards, and there the standards articulated by their own experts focus on predictability, focus on reliability, focus on being data driven, and they flunk those standards. Again, there is no data in this case -- no testimony in this case that these methodologies had been shown to have any predictive value with respect to a company still in the tort system. Thank you, Your Honor, for indulging us here this afternoon.

THE COURT: Mr. Lockwood. Mr. Bernick, if you need to leave, you may leave. I know that the debtor still has other people here, so you -- if you need to go --

MR. LOCKWOOD: He's finished --

MR. BERNICK: Well, I'm mindful of our time limits, and I will --

MR. LOCKWOOD: According to the agreement he's finished anyway, Your Honor. You've got a main and a reply and then you're done, so --

MR. BERNICK: But under the agreement they also used up all of their time.

MR. LOCKWOOD: We did not. We have --

MR. BERNICK: Well, I think that that's --

MR. LOCKWOOD: -- at least 20 minutes left.

MR. BERNICK: Well, now see this is another -- this is a problem we're having, Your Honor.

THE COURT: I think by my calculation you actually have ten, Mr. Lockwood.

MR. LOCKWOOD: Okay. Well, I'll take less than ten. First, Mr. Bernick said that -- he recited his agreement with me that, yea, they were insisting that their legal liability be determined, and yea, they were relying on 502(b), and he says we didn't have an answer to that. Either he wasn't listening, or I guess maybe I didn't make myself clear. We do have an answer for that. Those are the tests for the allowance or disallowance of claims, and that's not what is going on here. That's the answer. Five 0 two (b) is irrelevant. Legal liability is not the issue.

When discussing the issue of what the purpose of this estimation is all about, Mr. Bernick's explanation was it's about, quote, plan formulation, close quote. Apparently, his idea is that the parties in this case can come to a bankruptcy judge and put on an 18-day trial for the purpose of the judge giving him hints about what they ought to put in their plan. I'm not aware of anything in the Bankruptcy Code that suggests that that is an appropriate subject for a contested matter. They've got a plan. They formulated the plan. If they think it's got defects in it, they can change the plan. When we get

the confirmation, if the Court says their plan isn't confirmable, they can withdraw it and put in a new plan that is. Ditto for us. That's the way it works. We don't go out and ask people for advice -- bankruptcy courts for advisory opinions about how we ought to go about drafting plans that meet confirmation standards.

Apparently, he's so into advisory opinions that his -- he wants to characterize Judge Brown's ruling on his 408 argument as an advisory opinion, because he says Judge Brown wrote in his opinion that this -- I'm not deciding anything anywhere about any matter that matters except for the purposes of this case. So, in other words, Rule 408, one ticket, one ride. That case only, can't be used for precedential effect anywhere else, even though that's the only case that that has been cited by the debtors in which anybody made a Rule 408 argument that remotely resembled the one that's being made here, and it was rejected.

Finally, he -- it's kind of cute the way he does this what we're here about is science not what we're here about is something other than science, a practice that doesn't -- isn't physics. And what is his source for the notion that when we estimate the future liabilities of the debtor pursuant to 524(g), that's an exercise in science? Let's see authority for that. Well, Dr. Peterson said that what he did he thought was science, and Ms. Biggs said that she's -- she thought what she

did was actuarial science, and, therefore, because they thought what they were doing was science here, that means that it is science. It's pretty interesting that he's willing to take their assertions on that point as gold and treat everything else they have to say as dross.

The fact of the matter is Your Honor can figure out perfectly well without the -- without testimony from either Mr. -- Dr. Peterson or Ms. Biggs exactly what it is that's going on here and trying to estimate the inherently unknowable. It's an estimation of something that's unknowable. And with all due respect to Dr. Peterson and Ms. Biggs and whatever bunch of experts they may put up on their side, to say that that's an exercise in science is ridiculous. And, moreover, the -- by that token, they haven't put on any expert of their own who has testified that what they've done to exercise -- estimate their liabilities is, quote, science. What they've done is they put on some people who say that their opinions on medicine and industrial hygiene and risk analysis are some kind of science, but those are only sort of pieces.

When it gets to Dr. Florence, I don't hear anything about Dr. Florence talking about science. And, moreover, even if Dr. Florence did talk about science, at the end of the day, as I said earlier in which Mr. Bernick has ignored, when he says his experts aren't lawyers, but they don't have to be, they're being asked collectively through Dr. Florence to tell

this Court what kind of a claim has legal validity, and that's not science either. Apart from the fact that it is an invasion of the province of this Court to determine whether claims in a proper setting under proper procedural protections for allowance and disallowance do or do not meet the legal standards for claim validity. That's all I have, Your Honor. Thank you.

THE COURT: All right.

MR. FINCH: Thank you very much, Your Honor, for indulging us today.

THE COURT: Okay. We are -- Mr. Finch?

MR. FINCH: No, we're --

THE COURT: Okay. We are adjourned until Wednesday morning at 9:00. Thank you. Moana, will you hit that button again, so it turns back on? Okay. Thank you.

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C E R T I F I C A T I O N

We, TAMMY DeRISI, LYNN SCHMITZ, and PATRICIA C. REPKO, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Tammy DeRisi
TAMMY DeRISI

DATE: January 17, 2008

/s/ Lynn Schmitz
LYNN SCHMITZ

/s/ Patricia C. Repko
PATRICIA C. REPKO

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